

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INVESTOR COMMUNICATIONS
INTERNATIONAL, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

CASE NO. C05-1960JLR

ORDER

I. INTRODUCTION

This action comes before the court on a motion to dismiss (Dkt. # 5) from the Government and a motion to extend time for service (Dkt. # 9) from Petitioner Investor Communications International, Inc. (“ICI”). For the reasons stated below, the court DENIES the Government’s motion and GRANTS ICI’s motion.

II. BACKGROUND

On January 19, 2005, Agent Paul Shipley of the Internal Revenue Service served a subpoena on Bank of America for records related to ICI. Shipley Decl. ¶ 3. On the same day, Mr. Shipley sent notice of the subpoena to ICI by certified mail. Id. ¶ 5.

On February 8, 2005, ICI filed a petition to quash the subpoena in this court (Dkt. # 1). On the same day, ICI sent the petition by certified mail to Bank of America and to Mr. Shipley. Second Cepeda Decl. ¶¶ 1-3, Ex. A.

1 On February 14, 2005, ICI filed an amended petition to quash the subpoena in this
2 court (Dkt. # 3). On the same day, ICI sent the amended petition by certified mail to
3 Bank of America and to Mr. Shipley. First Cepeda Decl. ¶¶ 1-3, Ex. A.

4 Eight months passed in which neither party took any action. In late October 2005,
5 the Government filed the instant motion to dismiss based on improper service under
6 Federal Rule of Civil Procedure 4. In December 2005, ICI filed the instant motion for an
7 extension of time to effect service. In that motion, ICI noted that it had allegedly
8 properly served its amended petition on the Government under Rule 4 on November 23,
9 2005.

10 III. ANALYSIS

11 The instant motions raise two separate issues. The first is ICI's obligation to
12 properly serve notice of its petition to quash under 26 U.S.C. § 7609. The second is ICI's
13 obligation to serve notice of its petition under Rule 4. As the first issue puts the court's
14 subject matter jurisdiction in question, the court turns to it first.

15 A. The Court Has Subject Matter Jurisdiction Over ICI's Original Petition.

16 Under 26 U.S.C. § 7609(a)(1), the Government must notify a person with an
17 interest in a third-party subpoena (other than the third party) within three days of serving
18 the subpoena, and not less than 23 days before the date the third party must comply with
19 the subpoena. Section 7609(a)(2) governs the manner of serving notice on the interested
20 person. Among other methods of service, the section states that notice is "sufficient" if it
21 is "mailed by certified or registered mail to the last known address of such [interested]
22 person." 26 U.S.C. § 7609(a)(2).

23
24 Once the Government serves notice of the subpoena to the interested party, the
25 clock begins to run on the interested party's right to file a petition to quash the subpoena.
26 The interested person must "begin a proceeding to quash such summons not later than the
27

1 20th day after the day such notice is given in the manner provided in subsection (a)(2).”
2 26 U.S.C. § 7609(b)(2)(A). The interested party must also “mail by registered or certified
3 mail a copy of the petition to the person summoned and to such office as the Secretary
4 may direct in the notice [of the subpoena].” 26 U.S.C. § 7609(b)(2)(B).

5 The obligations imposed on the interested party in subsections (b)(2)(A) and
6 (b)(2)(B) are jurisdictional. In Ponsford v. United States, 771 F.2d 1305, 1309 (9th Cir.
7 1985), the court held that the “twenty-day limit must be strictly construed because it is a
8 condition precedent to the [United States’] waiver of sovereign immunity.” The court
9 upheld the trial court’s dismissal for lack of subject matter jurisdiction. Although
10 Ponsford explicitly addressed only compliance with subsection (b)(2)(A), several district
11 courts have held that the service requirements of subsection (b)(2)(B) are jurisdictional as
12 well. E.g., Beam v. United States, No. 90-6182-JO, 1990 U.S. Dist. LEXIS 16125, at *5
13 (D. Or. Nov. 14, 1990); Nosewicz v. United States, No. 94-398 PHX EHC, 1995 U.S.
14 Dist. LEXIS 866, at *5 (D. Ariz. Jan. 5, 1995); Strong v. United States, 57 F. Supp. 2d
15 908, 916 (N.D. Cal. 1999). Because the court finds no basis to distinguish the service
16 provisions of subsection (b)(2)(B) from those of subsection (b)(2)(A), the court holds that
17 an interested party’s compliance with subsections (b)(2)(A) and (b)(2)(B) within 20 days
18 of notice of a third-party subpoena is a prerequisite to subject matter jurisdiction.

19
20 The 20-day period in which to begin a proceeding under subsection (b)(2)(A) and
21 to provide notice under subsection (b)(2)(B) starts on the date the notice of subpoena is
22 *mailed* to the interested party. E.g., Stringer v. United States, 776 F.2d 274, 275 (11th
23 Cir. 1985); Faber v. United States, 921 F.2d 1118, 1119 (10th Cir. 1990); Clay v. United
24 States, 199 F.3d 876, 878 (6th Cir. 1999). Several district courts within the Ninth Circuit
25 have come to the same conclusion. E.g., Lodholm v. Reno, No. C00-5004FDB, 2000
26 U.S. Dist. LEXIS 4442, at *2-3 (W.D. Wash. Mar. 10, 2000); Hill v. Mosby, 896 F.

1 Supp. 1004, 1005 n.1 (D. Idaho 1995). The Ninth Circuit has yet to address this issue in
2 a published opinion.

3 In this action, the Government provided notice of the third-party subpoena to ICI
4 by mailing it on January 19, 2005. ICI thus had until Tuesday, February 8, 2005, to
5 comply with subsections (b)(2)(A) and (b)(2)(B). ICI's original petition, which it sent by
6 certified mail to Mr. Shipley and Bank of American on February 8, 2005, is therefore
7 timely. ICI's amended petition, which it did not mail until February 14, 2005, is
8 untimely.¹

9
10 **B. The Court Grants ICI Additional Time to Address Its Obligations
under Rule 4.**

11 The court turns now to ICI's alleged failure to timely serve its petition under
12 Rule 4. Other than noting that Rule 4(m) generally requires a party to effect service
13 within 120 days after filing a complaint, there is no need for the court to review the
14 requirements of Rule 4, because ICI has clearly not complied with the rule. ICI has never
15 attempted to serve its original petition (as opposed to its amended petition) in compliance
16 with Rule 4. Even as to its amended petition, ICI never served the petition along with a
17 properly issued summons, as Rule 4(c)(1) requires.

18 The Government has cited no authority establishing that Rule 4 applies to a
19 petition to quash summons under 26 U.S.C. § 7609(b). The court is unaware of Ninth
20 Circuit authority addressing the issue. Several district courts have held that Rule 4
21 applies. E.g., Hicks v. United States, No. 1:02CV00284, 2003 U.S. Dist. LEXIS 868, at
22

23
24 ¹For reasons not apparent from the record, the notice of subpoena that ICI received
25 from the Government directed it to file a petition to quash and serve it within 20 days of
26 January 21, 2005. Pet. to Quash, Ex. A. Even if the court uses January 21 as the date on
27 which the Government gave notice, ICI had until February 10, 2005 to comply with
subsections (b)(2)(A) and (b)(2)(B) as to its amended petition. ICI did not comply until
February 14, 2005.

1 *4-*5 (M.D.N.C. Jan. 17, 2003), Roebuck v. United States, No. Misc. M-1-83, 1997 U.S.
2 Dist. LEXIS 21551, at *8-10 (S.D. Iowa Dec. 23, 1997). Other district courts have held
3 that Rule 4 does not apply in a proceeding under 26 U.S.C. § 7609. E.g., Rich v. Cripe,
4 No. 2:97-0051, 1997 U.S. Dist. LEXIS 17147, at *14 (M.D. Tenn. Oct. 7, 1997).
5 Although the Fourth Circuit has noted that the Federal Rules of Civil Procedure generally
6 apply to proceedings under 26 U.S.C. § 7609, it has also noted exceptions which may
7 apply in this case. Alphin v. United States, 809 F.2d 236, 239 (4th Cir. 1987) (noting that
8 rules are inapplicable where a statute provides otherwise, or “when to apply them literally
9 would impair the summary nature of the proceeding”). At least one court has refused to
10 compel the Government to comply with Rule 4 because the tax code provides an alternate
11 service mechanism. Gaunt v. Internal Revenue Serv., No. 4:MC-96-0022, 1996 U.S.
12 Dist. LEXIS 6531, at *3-4 (M.D. Pa. May 1, 1996).

14 The court need not decide at this point whether Rule 4 applies to ICI’s petition.
15 Unlike compliance with the service requirement in 26 U.S.C. § 7609, service under Rule
16 4 is not a prerequisite to subject matter jurisdiction. Rule 4(m) provides the court with
17 broad discretion to excuse delayed service. De Tie v. Orange County, 152 F.3d 1109,
18 1111 n.5 (9th Cir. 1998) (“If no good cause is shown, the 1993 amendments to Rule 4(m)
19 permit, but do not require, the district court to extend the time for service.”). In this case,
20 the Government received immediate service of ICI’s petition in compliance with 26
21 U.S.C. § 7609. Even assuming that Rule 4 applies, ICI believed in good faith that it had
22 complied with its service obligations, a belief that it retained while the Government did
23 nothing to challenge service for more than eight months. On these facts, the court
24 declines to dismiss ICI’s petition for improper service.

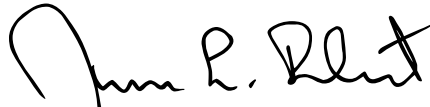
C. The Parties Must Immediately Begin to Prosecute this Action.

This action has languished for more than a year. It will not languish any longer. Within 21 days of this order, ICI must either obtain a summons and effect service of its petition in compliance with Rule 4, or obtain a waiver of service from the Government, or file a motion to establish that Rule 4 does not apply in this action. Within 14 days of service, a waiver of service, or a court order excusing service, the Government must file and properly note a motion to compel compliance with the subpoena. See Ryerson v. Internal Revenue Serv., 371 F. Supp. 2d 1130, 1133 (D. Ariz. 2005) (describing burdens on Government and taxpayer in a petition to quash); see also United States v. Powell, 379 U.S. 48, 57-58 (1964). If any party fails to comply with this order, the court will either dismiss this petition or quash the subpoena for failure to prosecute.

IV. CONCLUSION

For the reasons stated above, the court DENIES the Government's motion to dismiss (Dkt. # 5) and GRANTS ICI's motion to extend time for service (Dkt. # 9).

Dated this 15th day of February, 2006.



JAMES L. ROBART
United States District Judge